IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

WRIT PETITION NO.3243 OF 2002

The State of Maharashtra
through the Secretary
General Administration Department
Mantralaya, Mumbai - 32

2. The Director
Soldier Welfare Department (MS)
Having office at Vidhan Bhavan
Pune - 1 ... Petitioners

V/s.

Shri Eknath Shankar Dumbare
r/o. Jadhavwadi, Post-Bori (Bdk.)
Tal.Junnar, Dist.: Pune ... Respondent

Mr.C.R. Sonawane, AGP, for Petitioners
Mr.N.V. Bandiwadekar for Respondent

CORAM: **H.L. GOKHALE &**
SMT.NISHITA MHATRE, JJ.

DATED: **SEPTEMBER 10, 2004**

ORAL JUDGMENT (PER H.L. GOKHALE, J.):

. This Writ Petition is filed by the State of Maharashtra and the Director of Soldier Welfare Department to challenge the judgment and order dated 4.10.2001 passed by the Maharashtra Administrative Tribunal (hereinafter referrred to as 'MAT') in Original Application No.775 of 1995 which was filed by the respondent to the Tribunal. The application was filed by the respondent to challenge the order of dismissal passed by the Petitioners against the respondent and

under the impugned order, the MAT allowed that application and set aside the order passed by the State Government dismissing the employee by its order dated 4.12.1995 and directing the Petitioners to allow him to voluntarily retire. It is this order which is challenged under the present Petition.

2. The short facts leading to the present petition are as follows:

The respondent herein was born on 15.4.1939 and passed his 10th Standard examination but could not pass the 11th standard examination which was the SSC examination some time in the year 1961. He failed in the SSC examination in March, 1961 but since those were the days of national emergency, he joined the army on 16.9.1961 in the post of radio operator. After serving the armed forces for about 11.1/2 years, he took a discharge on compassionate grounds on 24.3.1973. Thereafter, he registered himself with the Soldiers Welfare Board at Pune and also local employment exchange for securing a civilian job. He was sponsored by employment exchange. He was thereafter appointed by the Soldier Welfare Board temporarily initially on 4.9.1973 and subsequently confirmed on 29.11.1977 in the grade of Junior Clerk. Some time in the year 1985, an order came to be passed granting him a condonation of break in service whereby

his services in the armed forces and the civilian service would be considered together and continuous.

3. It so happened that on 1.2.1993, a complaint was lodged by one Ashok Patil to this Board informing the Board that the respondent had not passed the SSC examination and had not produced that certificate. On receiving this information appropriate enquiry was sought to be made with the respondent but he did not come forth with clear answer. The Petitioners also made enquiry at their end and ultimately decided to chargesheet him. A chargesheet was issued to him on 15.6.1993 and the charge levelled against him was not to remain present and to produce the papers showing that he had passed the SSC examination. Annexure 1 contained this charge and Annexure 2 contained the description thereon. The description stated that the respondent had made certain erasions in the service book where entries had been made with respect to educational qualifications and thereafter when an enquiry was sought to be made he did not remain present nor did he produce the certificate of his educational qualifications. It is material to note that when this investigation started based on the complaint of Mr.Patil dated 1.2.1993 and when the respondent came to know about the same, he opted to retire voluntarily and made a necessary application on 14.5.1993. It is one of the submissions

made on his behalf that he had applied for voluntary retirement prior to the issuance of the chargesheet dated 15.6.1993. It is however, material to note that the notice prior to the chargesheet calling upon him to give an explanation has been issued to him prior thereto on 27.4.1993.

4. The chargesheet followed a departmental enquiry. Evidence was led on behalf of the department and the respondent-employee also gave his explanation. During the enquiry two documents came to be placed on record. One was of course the school leaving certificate which showed that the respondent had not passed the SSC examination and then the first page of his service book bearing the signature of the respondent in approval of the entries therein. The respondent admitted that those entries were made by him and on column No.8 against the educational qualifications, the words "SSC (Xth)" were initially written and subsequently, the entry "Xth" was scored out. The respondent-employee in his deposition in the enquiry accepted on 18.8.1993 that he had been asked to fill the information on the first page of the service book. He has further stated that he thought that passing of the tenth standard examination was SSC and therefore, out of misunderstanding he must have written that he had passed SSC. He further stated that a sympathetic view be taken.

5. In view of this material which came on record of the enquiry, the enquiry officer has noted that the respondent had passed his 10th standard examination and then gone further to appear for the SSC examination in the year 1961. In those days, SSC examination was to be given after 11th standard only. In fact, the school leaving certificate clearly stated that he had been sent forward to appear for the SSC examination of March, 2001 and that was the reason of leaving the school as entered in entry No.12 in the school leaving certificate. The enquiry officer also noted that the respondent had made erasions in the service book and he had admitted that he had done that. Hence, in the last but one paragraph of the findings of the enquiry officer, he came to the conclusion that he had made such erasions and that he had not produced any evidence that he had passed SSC or an equivalent examination. Hence, in the last paragraph, the enquiry officer held that the allegation against him had been proved and that he deserved appropriate punishment. The Enquiry Officer, however, observed that it was not known as to in what circumstances he was given the employment in the year 1973. The fact that these papers were not produced, that he had put in 20 years in service and further that he had been subsequently promoted to the post of senior

clerk were also factors to be considered. In the last but one paragraph, the Enquiry officer also held in this behalf that it was not proved that the respondent had produced false certificates to get the employment. In these circumstances, he made a recommendation that the delinquent employee be compulsorily retired from the government service since he was not having the necessary qualifications.

6. It appears that although the enquiry report was served on the respondent, it is his case that he was not served the consequent order dated 6.4.1994 compulsorily retiring him from service. The State Government formed an opinion that this punishment was not an appropriate one and suo motu exercised the powers of the State Government under Rule 25(1)(b) of the Maharashtra Civil Service (Discipline & Appeal) Rules, 1975. The Government issued notice to the respondent as to why the punishment should not be enhanced and thereafter an order of dismissal came to be passed on 4.2.1995. It is material to note that as recorded in that order, the respondent was given an opportunity to make his submissions and by his representation dated 14.10.1994, he has made his submissions. The Government came to the conclusion that inasmuch as the respondent did not have the necessary qualifications of having passed the SSC examination to get a clerical appointment and inasmuch

as he had carried out erasions in the service record, he deserved to be dismissed from service. Accordingly, this order was passed.

7. It is this order which led to the filing of the Original Application by the respondent to the MAT. As far as the Administrative Tribunal is concerned, having heard the parties and having perused the record, it came to the conclusion at the end of para 6 of its order that the findings recorded by the Enquiry Officer that the misconduct had been duly proved could not be said to be either perverse or with no evidence. Yet, the Tribunal took a sympathetic view. It was of the view that the Government was not in a position to show that the respondent had procured the service by making a false representation at the inception. The punishment was rather a harsh one and in the view of the Tribunal, permission to retire voluntarily ought to have been granted to the respondent. This was particularly when his service record was good and also in view of the Government's decision that in case of ex-armed forces personnel, the educational qualifications could be relaxed. The Tribunal, therefore, allowed the Original Application, set aside the order passed by the Government and permitted the respondent to retire voluntarily. It is this order passed by the Tribunal which is under challenge under the present Petition.

8. Mr.Sonawane, learned Assistant Government Pleader appearing for the Petitioner, submitted that it is clear from the record that the respondent had not passed the SSC examination which was the necessary qualification. The respondent was given a notice and was given a full opportunity to defend. He did not come clean. On the other hand, it is seen that he has done erasions in the service record which he confessed. Mr.Sonawane relied upon a government resolution dated 12.10.1993. It has reference to the judgment of the Apex Court in the case of *District Collector & Chairman Vizianagaram (Social Welfare Residential School Society) Vizianagaram & Anr. v/s. M.Tripura Sundari Devi*, **1990(4) SLR 237.** The relevant paragraph of the judgment is extracted in the Government Resolution which states that a Court should not be a party to the perpetuation of a fraudulent practice. The Government Resolution states that if a government employee whether on probation or temporary, has indulged into such practices, he should be discharged from his services. If he has become a permanent government worker, enquiry must be held and if the charges are proved, he should be removed or dismissed from service. Mr.Sonawane therefore, submits that in the facts of the present case the Tribunal should not have passed the impugned order and the order passed by the Government was perfectly

justified.

9. Mr.Bandiwadekar, learned Advocate appearing for the respondent, submits that there was no advertisement given by the Soldier Welfare Board in pursuance to which the respondent had applied. No qualifications as such were declared and sought and the name of the respondent was forwarded by the employment exchange. He also referred to the decision of the State Government dated 2.5.1963 which gave special concessions to the persons who rendered defence services during the national emergency. In clause (3) of that Resolution, it is provided that the requirements relating to educational qualifications should be relaxed in favour of a candidate who has been prevented (because of his joining the defence services) from securing the necessary qualifications. In the present case, the Petitioner has just passed his 10th standard examination in the year 1961 but he failed in the SSC examination. But immediately, he joined the armed forces in September 1961. If he was to continue in his education, he would have certainly completed his SSC and accordingly secured proper qualifications. It is only to respect the call of the nation that he joined the armed forces and served there for 11.1/2 years. On his joining the civilian services, he was never told that he had to be SSC to get the particular job. It is only in the year 1993 that

somebody lodged a complaint and during the investigation of that complaint, the respondent has honestly accepted that he had done some erasions but those were also out of some misunderstanding. That apart, Mr.Bandiwadekar submitted that the order passed by the original authority was not served on to the respondent and therefore, he could not get an opportunity to file an appeal. All these factors have to be considered in his submission. The Tribunal has considered the fact that the respondent had put in long years of good service, he has received promotion also and when he wanted to voluntarily retire himself, that ought to have been permitted and this is what the Tribunal has done.

10. As noted above, the Government Resolution relied upon by Mr.Sonawane refers to the judgment of the Apex Court in the case *District Collector & Chairman Vizianagaram (Social Welfare Residential School Society) Vizianagaram & Anr. v/s. M.Tripura Sundari Devi*, **1990(4) SLR 237**. Mr.Bandiwadekar pointed out that in that case the qualifications required were passing M.A. in Hindi in second class whereas the concerned candidate had passed in third class. This was, however, noticed at the inception when the scrutiny was done and the candidate was discontinued though initially an erroneous order was passed appointing her as a post-graduate teacher. Mr.Bandiwadekar submitted that the

observations of the Apex Court in that case have to be looked into in the facts of that case. He submitted that in that case an advertisement had been issued and other candidates were available. In his submission, it could not be said that the present case had caused any prejudice to anybody else by his selection. He drew our attention to two more judgments in the cases of *Dr.M.S. Mudhol & Anr. v/s. Shri S.D. Halegkar & Ors.*, **1993(4) SLR 364** and *Rekha Chaturvedi v/s. University of Rajasthan & Ors.*, **(1993) 25 ATC 234**. In both these cases, the concerned candidates did not have the necessary qualifications but had been continued for long years in service. In the case of *Dr.M.D.Mudhol & Anr.* (supra), it was 12 years whereas in the case of *Rekha Chaturvedi* (supra), it was eight years. In both the cases, though the qualifications were found to be deficient, and though the Court criticised the departure from the selection processes, the selections were left undisturbed. Mr.Bandiwadekar submitted that a similar approach should be adopted in the present case.

11. We have considered these submissions made by both the Counsel. In the present case, although it is seen that there was no advertisement as such, and the respondent's case was forwarded by the employment exchange, when an enquiry was made to him about his qualifications, the respondent did not come with clean

explanation. He could have stated that in view of the government's resolution dated 2.5.1963, a relaxation would be appropriate. Not only that it was noticed that shortly after joining, when the entries were made in the service book, he had tried to pass off as if he had completed his SSC examination. Thus, it could also be said that he knew that the qualification of passing SSC was necessary. When the enquiry was ultimately held and when all these factors were noted, it could not be said that still the government should have allowed the respondent to voluntarily retire with all benefits. It is possible for the respondent to say that he did not deprive anybody else from his employment but at the same time, it also appears that he did tamper with the government record and tried to pass off as if he had passed the SSC examination. The charge against him was that of dealing dishonestly with the State Government. The annexure 1 stated that the charge was non-production of the necessary papers in spite of asking him to produce them time and again and annexure 2 giving the description specifically alleged that he had effected erasions in his service book and then he did not produce the relevant educational qualifications. The Tribunal also came to the conclusion that these charges were proved. If this was the conclusion of the Tribunal surely the Tribunal could not have gone to the extent of allowing him to retire voluntarily. That would mean in

spite of these grave irregularities and misconduct, during the service period, the respondent will be allowed to go scot-free. The cases relied upon by Mr.Bandiwadekar are also different on facts inasmuch as there is no allegation of tampering of the record in those two cases. Similarly, although the case of *District Collector & Chairman Vizianagaram (Social Welfare Residential School Society) Vizianagaram & Anr. v/s. M.Tripura Sundari Devi* (supra) is of detecting deficiency in qualifications at the initial stage, it does not mean that when deficiencies are detected at a later stage and wrong practices are indulged into to continue in service that should be condoned. One of the points which impressed the Tribunal was with respect to the revisional powers exercised by the State Government. The Tribunal seems to have taken a view that the revisional power of the State Government can be exercised only after an appeal. In the present case, the Government had waited for the full period within which the appeal can be filed and thereafter this power was exercised. The relevant Rule 25(1) of the Maharashtra Civil Services (Discipline & Appeal) reads as under:

> 25. Revision:-
> (1) Notwithstanding anything contained in these rules, the Governor or any authority subordinate to him to which an appeal against an order imposing any of the penalties specified in rule 5 of these rules lies may, at any time, either

on his or its own motion or otherwise call for the records of any inquiry and revise any order made under these rules or under the rules repealed by rule 29 of these rules from which an appeal lies but against which no appeal has been preferred or orders against which no appeal lies, after consultation with the Commission where such consultation is necessary, and may -

(a) confirm, modify or set aside the order; or

(b) confirm, reduce, enhance or set aside the penalty imposed by the order, or impose any penalty where no penalty has been imposed; or

(c) remit, the case to the authority which made the order or to any other authority directing such authority to make such further inquiry as it may consider proper in the circumstances of the case; or

(d) pass such other orders as it may deem fit:

Provided that, no order imposing or enhancing the penalty shall be made by any revising authority, unless the Government servant concerned has been given a reasonable opportunity of making a representation against the penalty proposed, and where it is proposed to impose any of the major penalties or to enhance the penalty imposed by order sought to be revised to any of the major penalties, no such penalty shall be imposed except after an inquiry in the manner laid down in rule 8 of these rules except after consultation with the Commission where such consultation is necessary:

Provided further that, no power of revision shall be exercised by the authority to which an appeal against an order imposing any of the penalties specified in rule 5 of these rules, lies unless

(i) the authority which made the order in appeal, or

(ii) the authority to which an appeal would lie, where no appeal has been preferred is subordinate to it.

This Rule permits the State Government to exercise the

power of revision suo motu and in our view there was nothing erroneous in exercising that power. In the circumstances, we are of the view that the Tribunal ought not to have passed an order that it has passed.

12. At the same time, we do feel that the factors in favour of the respondent also ought to be considered while arriving at an appropriate punishment. The respondent had joined the armed forces during the emergency and had put in 11.1/2 years of service. he had thereafter put in a long number of years of civilian service. His service record is clean and he got promotion during that service also. It is also to be noted that as such there is a rule of relaxing educational qualifications for the persons who joined armed forces during the emergency. If the respondent was to make a clean statement, that should have been the best for him. It is only the method adopted by him that has landed him into difficulty. However, we are of the view that though the respondent has committed a wrong, while imposing the punishment, the government also should not take an extreme position. The punishment of compulsorily retirement which was imposed by the original authority was in our view appropriate in the circumstances. We are shown the relevant rules. Under the relevant rules, in the even of compulsory retirement, the employee concerned is eligible to get

2/3rd of his pension and/or the gratuity. The relevant rule 100 from the Maharashtra Civil Services (Pension) Rules, 1982 reads as follows:

> 100. Compulsory Retirement Pension.-(1) A Government servant compulsorily retired from service as a penalty may be granted, by the authority competent to impose such penalty, pension or gratuity or both at the rate not less than two-third and not more than full compensation pension or gratuity or both admissible to him on the date of his compulsory retirement.
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> (2) Whenever in the case of a Government servant the Government passes an order (whether original, appellate or in exercise of the power of review) awarding a pension less than the full compensation pension admissible under these rules, the Maharashtra Public Service Commission shall be consulted before such order is passed.
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> Explanation. - In this sub-rule, the expression "Pension" includes gratuity.
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> (3) A pension granted under sub-rule(1) shall not be less than the minimum pension as fixed by Government.

13. As per this Rule, a government servant who is compulsorily retired, may be granted pension, gratuity or both not less than 2/3rd and not more than full compensation pension. In our view, the punishment of compulsory retirement imposed by the original authority was appropriate. We, however, clarify that under this Rule, he ought to be given his pension as well as gratuity, both reduced to 2/3rd of the full pension and full gratuity. The entire service rendered under the armed forces as well as under the State Government will

be computed continuously and together for both these benefits.

14. With this order, the Petition stands disposed of. Rule made absolute in part with no order as to costs.

(H.L. Gokhale, J.)

(Nishita Mhatre, J.)